Supreme Court, U.S.
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No.____

IN THE

Supreme Court of the United States

Joseph Cotter
Petitioner

v.

City of Portland
Respondent

Petition For a Writ of Certiorari
To The Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Introduction

The City of Portland folded public art murals into its Sign Code in 1998, due to a summary judgment, arising out of litigation brought by the billboard company, AK Media (now Clear Channel), against the City of Portland. The court had found the previous sign code unconstitutionally underinclusive because it regulated signs and left murals unregulated. This subsequent inclusion of public art into the sign code resulted in a virtual ban of public art murals. This case was initiated in order to challenge the constitutionality of regulating public art within the sign code.

Question

Whether the Oregon Supreme Court erred in declining review of an Oregon Appeals Court decision, affirming without opinion an Oregon Land Use Board of Appeals opinion, finding that the City of Portland Sign Code was not unconstitutional on its face according to the First, Fifth and Fourteenth Amendments of the United States Constitution, and was not unconstitutionally applied to a public art mural.

PARTIES TO THE PROCEEDING

The parties to he proceeding are as they appear on the front cover:

Petitioner/Appellant - Joseph R. Cotter

Respondent/Appellee - City of Portland

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OPINIONS BELOW

The decision of the Oregon Supreme Court - *Review Denied* - is reported at 337 OR 476, and is reprinted in the Appendix to the Petition ("Pet. App.") at Pet App.1.

The decision of the Oregon Court of Appeals - *Affirmed Without Opinion* - is reported at 194 OR App 48, and is reprinted at Pet. App.2.

The Final Opinion and Order of the Oregon Land Use Board of Appeals has been designated for publication but is not yet published. It is reprinted at Pet. App. 3-21.

The Notice of Final Findings, Conclusions and Decision of the Adjustment Committee, LU 02-151145 AD, is not published. It is reprinted at Pet. App. 22-39.

Notice of a Type II (Administrative) Decision, LU 02-151145 AD, is not published. The analysis, findings, and conclusions were adopted by the Adjustment Committee and reprinted at Pet. App. 22-35.

JURISDICTION

The Oregon Supreme Court entered its judgment on September 28, 2004. This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the First, Fifth and Fourteenth Amendments of the United States Constitution. The pertinent provisions are reproduced at Pet. App. 40 .

This case involves the City of Portland Sign Code, Title 32 and Article I, Section 8 of the Oregon Constitution. The pertinent provisions are reproduced at Pet. App. 41-41a.

STATEMENT OF THE CASE

This case directly illustrates the negative effect of commercial media consolidation upon individual expression as manifested through public art. Resolution of the question presented here will determine the viability of public art programs in Oregon and throughout the country.

The City of Portland has determined that all public art has to be regulated within the sign code even if that regulation results in the virtual termination of public art murals. This determination is based upon a summary judgment and a trial court opinion that directed the City to regulate signs and murals together, regulate neither (or come up with another constitutional solution). The City of Portland chose to regulate signs and public art, together.

The petitioner contends that such regulation is unconstitutional because the regulations impermissibly burden public art to the point where it is essentially banned. Specifically, the City of Portland sign code violates the First, Fifth and Fourteenth Amendments to the United States Constitution because it is unconstitutionally broad, unconstitutionally vague, regulates significantly more speech than necessary to achieve its ends, burdens public art more than signs because of inherent differences between them, restricts a particular category of speakers, and finally, it is unconstitutional because it leaves open no alternative channels of communication.

The petitioner also originally argued that the City regulated representational art and left abstract art unregulated. This would be a content based distinction. The City successfully argued against the inclusion of evidence that would have supported the petitioner's position. However, in doing so the City spelled out the scope of the sign code for the first time. That the City's sign code regulates all outside

expression, both two and three dimensional, that calls attention to itself. This includes both murals and sculpture. It should be noted that the City's sign code mentions murals only once in a 93 page sign code, public art and sculpture are not mentioned at all. The criteria are designed for signs and not for public art. Public art was folded into the sign code in order for the City to regulate signs and avoid potential litigation by the sign companies. There was nothing about public art that prompted regulation. As a matter of fact, the City has policies that promote public art but they are rendered impotent because of the sign code. *See* Pet. App. 42.

A. Factual Background

1. The City of Portland has been locked in a regulatory struggle with sign companies for at least 21 years. The City was sued in 1983 over its billboard regulations by AK Media, a sign company. The litigation was resolved in 1986 by a 10 year stipulated agreement between the City and AK Media (now Clear Channel). The City subsequently passed a sign code in 1991 that restricted the height and size of billboards and painted wall signs. At that time painted wall decorations (murals) were exempt. In 1996 the stipulated agreement expired and AK Media came under the provisions of the 1991 sign code.

Ak Media had some 566 billboards and many revenue producing painted wall signs in 1996. The new sign code restricted the height of all new signs to 25 feet and the absolute size to 200 square feet (Billboards were usually 288 or 672 sq. ft.). Relocation of billboards was disallowed and fines for noncompliance could be up to $1,000 a day.

PCC 33.910.030 of sign code defined sign:

> "Sign. Materials placed or constructed primarily to convey a message and which can be

viewed from a right-of-way or another property. Signs contain text, numbers, registered trademarks or registered logos."

Painted wall decorations, exempt from the sign code were defined:

> "Painted wall decorations. Displays painted directly on a wall which are designed and intended as a decorative or ornamental feature. Painted wall decorations do not contain text, numbers, registered trademarks or registered logos." (PCC 33.910.030)

The City was soon faced with a proliferation of large, unpermitted, painted wall signs by sign companies that believed the distinction between signs and painted wall decorations to be unconstitutional. The City responded on December 12, 1997 with a moratorium on all painted walls, both signs and painted wall decorations.

AK Media submitted several applications for signs that were rejected by the City. AK Media then filed for a summary judgment in circuit court.

The court found the distinction between signs and painted wall decorations to be a content based distinction and unconstitutional under Article I, Section 8 of the Oregon Constitution.

In response, the Portland City Council conducted a hearing on November 18, 1998. At the hearing, the Planning Commission presented a proposal that allowed painted secondary walls up to 14 feet. The City Attorney, while conceding that the provisions of the Planning Commission were constitutional, argued that they would be more difficult to defend in court than to regulate all painted walls as signs subject to the height and size restrictions of the sign code.

The City council voted to fold murals into the sign code. Title 32, the sign code now defined "sign" as:

> **"32.22.020"**
> "**YY. Sign.** Materials placed or constructed, or light projected, that (1) conveys a message or image and (2) is used to inform or attract the attention of the public. Some examples of 'signs' are materials or lights meeting the definition of the proceeding sentence which are commonly referred to as signs, placards, A-boards, posters, billboards, murals, diagrams, banners, flags or projected slides, images or holograms. The scope of the word 'sign' does not depend on the content of the message or the image conveyed." LUBA Rec. 170, Pet. App. 41.

The sign code included an adjustment process for oversized signs. The cost of the application then, was in the neighborhood of $1,200. The money would not be returned even if the application was denied. This was the only legal means to try to get a mural through the City regulations.

The effect of the moratorium and the regulation of murals as signs led to a virtual halt of mural production.

The litigation went into the trial phase before Judge Michael H. Marcus, where the old sign code was found to be unconstitutional according to the First Amendment of the United States Constitution due to the distinction at issue. In his opinion, Judge Marcus concluded (Pet. App.43-44) that:

> "...the sign code violated the First Amendment because the distinction based on text, numbers, registered trademarks or registered logos intentionally favored murals as one category of protected expression over other categories of noncommercial

speech without adequate governmental justification, and because the sign code was unjustifiably 'content-based' within the meaning of federal constitutional law. I have concluded that the plaintiff is not entitled to an injunction forcing the City to issue the permits in question because the new sign code (in common with the wall sign moratoria) is 'content neutral, 'because the plaintiff has failed to demonstrate on this record that there are not adequate alternative channels of expression in light of the 566 billboards it still maintains in Portland, because neither the sign adjustment criteria nor the design review guidelines have been applied to the plaintiff in other than a 'content neutral' manner and because both are now construed as requiring a content neutral application, and because the essence of the First Amendment violation that plaintiff suffered is not denial of the permits *per se* (because the City could constitutionally choose and has now chosen to subject murals and billboards to the same regulation) but of a sign code that was impermissibly *underinclusive* until the City made the required choice either to regulate murals and billboards alike or to spare regulation (or to take any other constitutional action)." *AK Media v. City of Portland* 9801- 00125, LUBA Rec. 190-254, **254**

The case was appealed to the Oregon Court of Appeals where it was dismissed in February of this year.

The petitioner, a mural artist, became involved when he testified at a Planning Commission Hearing for a public art project in May of 2000. He filed an *Amicus Curiae* brief in the *AK Media* v. City of *Portland* case at the Oregon Court of Appeals on November 7, 2001.

The cost of an adjustment was proving to be a serious

impediment to the production of murals. As a matter of fact, no murals had gone through the adjustment process and the City was discouraging potential applicants from seeking an adjustment. The petitioner and others petitioned the Portland City Council to revisit the issue, but were told that nothing could be done without new case law. *See* Pet. App. 47-48.

The petitioner, and other interested parties, including a community mural group, Metro Murals, set out to challenge the constitutionality of the sign code and obtain the necessary case law. The individuals donated time and artwork for an art auction to raise money for the adjustment. The petitioner applied for an adjustment on November 15, 2002.

B. Proceedings Below

The adjustment was an administrative process in the City of Portland Office of Planning and Development Review (OPDR). The application for an oversized sign, was for an adjustment to complete a three panel mural over 300 square feet on a Russian Restaurant. The center panel had already been permitted and painted.

- The mural project was developed within Southeast Uplift (SEUL), a neighborhood organization that administered a HUD grant through the Foster/Powell Target Area Project. The neighborhood was home to a large number of Russian emigrants. The mural was designed by a Russian speaking artist Liya Kot and the center panel had been painted with the help of a number of Russian youth.

The original applicant was Laura Feldman of SEUL and a member of Metro Murals. The sign permit fee had been waived by Margaret Mahoney the Director of OPDR. A waiver for the adjustment fee had been applied for by Laura Feldman but the adjustment application was discouraged and the waiver was denied in a letter from Margaret Mahoney.

See Pet. App. 45-46. This put an end to the project until a year later when the fee money was raised by the art auction.

The petitioner was the applicant and Metro Murals and Southeast Uplift were listed as parties of interest in the adjustment application. The adjustment fee of $1,435 was paid, the adjustment was granted and the oversized 'sign' (mural) approved in an administrative decision by OPDR. *See* Pet. App. 22-35.

The petitioner appealed the decision to the Adjustment Committee stating that the sign code was unconstitutional on its face, as applied and in direct conflict with policies of the Comprehensive Plan. *See* Pet. App. 42.

The Adjustment Committee held a *de novo* hearing on March 4, 2003 and another on March 18, 2003. The petitioner submitted an analysis and review of the administrative decision where he raised constitutional issues. Much of this analysis was devoted to compiling Federal, State and Local, statutes, programs and case law identifying 'art' as an entity having standing before the law. The analysis further stated that the City of Portland Sign Code was unconstitutional because it was not "narrowly drawn" or a "a reasonable fit", it impermissibly burdens speech by muralists, restricts a particular category of speakers, does not "leave open ample alternative channels for communication of the information," is unconstitutionally broad, and unconstitutionally vague. *See* Resp. Rec. at LUBA 91-132.

A number of other artists and art supporters testified in favor of the appeal. There was no testimony in opposition.

The Adjustment Committee determined that constitutional issues were outside the scope of review and voted unanimously to deny the appeal and uphold the administrative decision. The decision was final on April 4th, 2003. *See* Pet. App. 22-39

The petitioner appealed the decision of the

Adjustment Committee on April 24th, 2003 to the Oregon Land Use Board of Appeals (LUBA).

The petitioner and respondent, the City of Portland, filed a motion on May 29, 2003, suspending the appeal for four months pending the appeal in the AK Media Case. The AK Media appeal was not resolved by September 29, 2003 so petitioner revived the LUBA case. The petitioner also filed a motion to submit evidence not on the record on October 3, 2003. LUBA denied petitioner's motion to take evidence on October 21, 2003.

On October 28th, the petitioner and respondent filed another motion to suspend the appeal for 90 days; "...to explore alternative methods of resolving disputed policy issues." The motion was granted on October 30, 2003.

The case was reactivated on January 1, 2004. Petitioner submitted a petition for review on January 21, 2004. The petitioner reiterated the State and Federal constitutional issues in his brief stating that the sign code was unconstitutional on its face and that both the sign code and the adjustment criteria were unconstitutional as applied according to Article I , Section 8 of the Oregon Constitution and the First, Fifth and Fourteenth Amendments of the United States Constitution. Respondent's brief was filed on February 13, 2004. *See* LUBA Rec. 161-258.

Petitioner submitted a motion to take evidence on February 17, 2004 in response to the respondent's brief. It should be pointed out that the clock is supposed to stop until the evidentiary issues are resolved. LUBA failed to do so. The petitioner had asserted in the LUBA petition for review that the City's policy on public art was to regulate only representational images. He submitted evidence to support that observation. The respondent had argued in the respondent's brief that the City actually regulated all outside expression, both two and three dimensional, representational

and abstract.

LUBA heard oral arguments on February 19, 2004. The petitioner argued that the sign code was even more unconstitutionally broad if it actually regulated all that the respondent's brief said it did. At that time, the petitioner filed a prepared motion requesting; 30 days to complete his reply brief, permission to exceed the five page limit of the reply brief, and continuing the hearing to "resolve the evidentiary issues and to allow a more comprehensive review based on that evidence". Petitioner subsequently filed his reply brief on February 24, 2004.

LUBA finalized its decision on March 19, 2004. The Final Opinion and Order remanded the case back to the Adjustment Committee for reconsideration of the condition of lighting but found for the City of Portland on all of the constitutional issues.The Final Opinion and Order also denied the petitioner's motion to submit evidence, and it denied the reply brief as untimely. *See* Pet. App. 3-21.

The petitioner submitted a petition for judicial review to the Oregon Court of Appeals on April 8th, 2004. The constitutional issues were raised in an opening brief filed on April 22, 2004, There was no oral argument permitted due to the fact that the petitioner appeared *pro se*. The Court of Appeals affirmed the LUBA decision without an opinion on June 30, 2004. *See* Pet. App. 2.

The petitioner appealed the decision and raised the constitutional issues in a petition for review, filed with the Oregon Supreme Court on August 2, 2004. The Court denied review on September 28, 2004. *See* Pet. App. 1.

REASONS FOR GRANTING PETITION

This case presents an important federal question to the Court. Does federal law, permit a legislative body

unlimited discretion to regulate speech or expression in order to avoid the potential for litigation?

If the LUBA decision is allowed to stand, the viability of all public art programs in the State of Oregon and perhaps nationally are threatened. A powerful corporation, such as a sign company, could threaten litigation in an attempt to eliminate sign regulation, if a government did not regulate public art as signs. The mere threat of litigation could be enough for a government to subject public art to sign regulations that would result in a cessation of public art production. The sign code is in direct conflict with decisions of this Court because it has resulted in a virtual ban of a medium of expression, public art, through the application of criteria and regulations intended exclusively for signs.

I. Litigation Avoidance as "Significant Government Interest"

The petitioner contends that the sign code regulations have chilled a medium of speech, public art, to the point where it is essentially banned. The only demonstrated "significant interest" of the regulation of all outside expression, including public art, is to make it "easier" to avoid potential litigation.

The City of Portland has asserted that it has a significant interest in regulating signs. The City also has policies to promote public art. The City had never tried to regulate public art including murals until directed to by the Circuit Court. The City folded murals into the sign code in order to continue to regulate signs not because the murals were a problem. The City Council rejected alternative constitutional solutions in order to shield itself from the possibility of potential litigation, not because the alternative solutions were unconstitutional.

When the City Council was considering the regulation of murals, the City Attorney argued strongly against any compromise that would dilute the idea that murals were 'signs' under the code. According to the official minutes of November, 18, 1998, the Planning Commission proposed that the City Council could leave the lower 14 feet of building walls free of regulation. This is where most of the public art projects are created. The City Attorney, Mr. Rogers, opposed the idea. *See* Resp. Rec. at LUBA, 115:

> "Mr. Rogers said that he believes that height limitations are constitutional but somewhat less easily defended than an approach which makes no distinction based on height, type of wall etc. The easiest path for the city to defend is to regulate every sign to the same extent, no matter what type or on what type of structure or wall. The Planning Commission recommendation and the height limitation are both constitutional but do open up more room for legal challenges from those who contend they create unconstitutional distinctions based on content."

and:

> "Mr. Rogers said from a legal point of view he is more comfortable with the planning bureaus recommendation than with the Planning Commission's recommendation because it makes no distinction between signs. The Commission's recommendation, for instance, has the effect of allowing very large painted signs but not very large vinyl signs. on the same wall. Those kinds of distinctions open the door for arguments that this favors one sort of speech over another. While he

> believes the City can defeat that argument, it is more complicated, makes more distinctions and is more likely to be litigated. If you start with a more uniform approach it can always be relaxed later as the City sees what decisions the court is making."

The City Council had the opportunity to constitutionally regulate far less speech yet it chose not to do so in order to more easily avoid the *possibility* of litigation. Legislatures are not free to regulate speech indiscriminately when a more reasonable solution will do.

According to *Broadrick v. Oklahoma* 413 U.S. 601, at 612:

> "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." (citations omitted)
>
> and"
>
> "Litigants, therefore are permitted to challenge a statute not because their own rights to free expression are violated, but because of a judicial prediction or assumption that the statutes very existence may cause others not before the court to refrain from such constitutionally protected speech or expression."

The City Attorney in this case informed the City Council that other constitutional solutions existed that would allow for the continued production of murals but that such solutions would be more likely to be litigated. Can the

significant interest of the City in avoiding litigation permit unbridled discretion in regulating constitutionally protected speech? How is the sign code "narrowly drawn" as required by *Broadrick*? At the end of the day, the proclivity of a powerful adversary to initiate litigation can not be an allowable reason to indiscriminately regulate expression.

II. The Sign Code Is Unconstitutionally Broad And Vague

Although the petitioner's 'sign' adjustment was approved, *Broadrick* allows the petitioner to challenge the sign code because it has caused others: ..."to refrain from such constitutionally protected speech or expression."

This case was initiated for the express purpose of challenging the constitutionality of the City of Portland sign code, in order to produce the necessary case law to permit the Portland City Council to craft a functional and constitutional public art policy. That the existing policy "chilled" public art expression is not debatable since this is the only mural known to have gone through the adjustment process in six years.

The actual scope of the sign code was vague at best. The petitioner originally argued that the City's policy was to regulate only representational images. The petitioner argued that this policy was unconstitutional according to Article I, Section 8 of the Oregon Constitution and the First Amendment of the United States Constitution because it regulated some art and left other art unregulated because of content. The petitioner submitted evidence to support his position but it was denied by LUBA.

According to the Respondent's Brief at LUBA:

> "Petitioner's argument rests on an unstated premise: that the word 'image' refers *only* to

graphical representation of other objects. This reading of the word 'image' is too narrow. The definition of 'image' includes the following:"

"1. (a) an imitation or representation of a person or thing, drawn, painted etc.; especially, a statue; (b) a sculptured figure used as an idol."

"2. The visual impression of something produced by reflection from a mirror, refraction through a lens, etc."

"Webster's New Twentieth Century Dictionary Unabridged (Second Edition 1977), p, 907. While the word 'image' *includes* depictions of identifiable objects, it also includes *any* visual impression of something produced by reflection or refraction, such as refraction through the lens of the eye."

"The PCC's text demonstrates that the City's regulations use the word "image" in its broadest sense." P.6, 7 LUBA Rec. at 170, 171

It must be pointed out that this policy of the City of Portland sign code did not exist in writing before it appeared in the respondent's brief almost six years after the passage of the current sign code. It was written in response to the petitioner's contention that the City regulated only representational images. The 93 page sign code only mentioned murals once and public art not at all. Since there was no written policy, no standards as to the scope of the sign code, the City was able to apply the sign code flexibly, depending on the circumstances of the moment. This left the public guessing as to the policy of public art in the sign code.

This Court has addressed the issue in *Bagget v. Bullit* 377 U.S. 360, 367 (1964):

"... a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. Connally v. General Construction Co.,269 U.S. 385; Lanzetta v. New Jersey, 360 U.S. 451 ; Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495 ; United States v. Cardiff, 344 U.S. 144 ; Champlin Refining Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210.

The policy previously enforced, though vague, was not as indiscriminately broad. The policy outlined above describes a very broad sign code indeed, including sculpture:

> "Sculpture falls within the scope of this definition, as petitioner notes, and is subject to sign regulations regardless of whether the sculpture is abstract, representational, a corporate emblem, three dimensional lettering, etc." p.13 LUBA Rec. at 177

Not only does the respondent's brief argue that the word 'image' means: "...*any* visual impression of something produced by reflection or refraction, such as refraction through the lens of the eye," (p. 6, LUBA Rec. 170) but that sculpture is also regulated even though it never appears in the 93 pages of PCC Title 32, the sign code.

So any outside expression that "conveys a message or image" and "is used to inform or attract the attention of the public" is subject to be regulated as a sign. This goes far beyond the Circuit Court's decision requiring the City to regulate murals and signs together or regulate neither.

LUBA's Final Opinion and Order addressed this issue:

> "The gist of petitioner's second line of argument is that there are content-neutral ways to distinguish wall murals from 'signs,' and that the city is required to adopt those ways in order to avoid a host of constitutional difficulties allegedly caused by regulating wall murals as signs. We understand petitioner to argue that if the view expressed in the city's brief is correct -that the definition of 'sign' includes both representational and nonrepresentational images - then the scope of speech regulated by the sign code is even broader and hence more susceptible to constitutional infirmity than petitioner's first argument would suggest."
>
> Pet. App. 12

> "The breadth and even-handedness of the city's sign regulation is necessary in order to regulate signs in a manner consistent with Article I, Section 8."
>
> Pet. App. 14

III. Divergent Interpretations of Article I, Section 8, of the Oregon Constitution and the First Amendment of the U.S. Constitution

The Oregon courts have interpreted Article I, Section 8 of the Oregon Constitution as providing more protection for speech than the First Amendment of the United States Constitution:

The First Amendment of the United States Constitution:

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or

of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances," Pet. App, 40.

Article I, Section 8, Oregon Constitution

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Pet. App. 41a.

Oregon Court of Appeals:

> "We hold that the ordinance violates Article I, Section 8, because it regulates one kind of speech and not another, based on the difference in their content. The county can have no constitutionally acceptable interest in regulating commercial and noncommercial speech differently because of the content. The ordinance therefore also violates the equal privileges and immunities requirement of Article I, Section 20." *Ackerly Communications,Inc. v. Multnomah County* 72 Or App 617, 625

United States Supreme Court; *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912 56 L.Ed.2d 444 (1978):

> "To require parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such devitalization,

> we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position on the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." Id, at 456, 98 S.Ct., at 1918

The LUBA opinion stated in this case, (Pet. App. 14), that:

> "The breadth and even-handedness of the city's sign regulation is necessary in order to regulate signs in a manner consistent with Article I, Section 8."

It may be that the "dilution" described in *Ohralik* is manifest here when assessing speech regulation against Article I, Section 8 of the Oregon Constitution instead of the First Amendment. The Oregon Constitution is interpreted by Oregon courts as providing more protection for speech than the First Amendment of the United States Constitution. This may be true in theory, but if that line of reasoning leads to the compulsory regulation of non-content related, constitutionally protected speech, in order to regulate the time, place and manner of some other medium of speech, where then is the additional protection alluded to in Article I, Section 8, of the Oregon Constitution? It may in fact lead to less protection under certain circumstances such as this one, where the City of Portland feels compelled to regulate all outside expression, both two and three dimensional, that attracts the attention of the public, in one sign code, in order to protect itself from potential litigation. This analytical suppression of the differences inherent in the various mediums of speech, may lead to a virtual elimination of one or more mediums of speech, and yet leave another relatively unaffected. The unintended consequences of this analysis

may be the antithesis of the desired result, but that cannot excuse the actual result as unavoidable. It may be that this Court of last resort will have to intervene in order to inject some common sense into the discussion.

The petitioner did raise the First Amendment in relation to these issues and LUBA recognizes that fact in the Final Opinion and Order, Pet. App. 11-12:

> "Citing to cases under the Free Expression Clause of the First Amendment to the United States Constitution, petitioner argues that the code definition (1) is not a "reasonable fit" with respect to and does not advance the city's "substantial interests," (2) is impermissibly broad and vague, (3) impermissibly burdens speech by muralists, and (4) fails to leave open ample alternative channels of communication."

It does appear that LUBA's interpretation of Article I, Section 8, of the Oregon Constitution is in direct conflict with United States Supreme Court decisions concerning regulation of expression under the First Amendment of the United States Constitution.

IV. Context not Content Determines Category

The premise of the Portland sign code is that all expression in the public realm, from sculpture and murals to billboards, has to be regulated by the same rules (in this case the sign code) or not regulated at all. This premise stems from the *AK Media v, City of Portland* opinion that stated that:

> "...the sign code violated the First Amendment because the distinction based on text, numbers, registered trademarks or registered logos intentionally

favored murals as one category of protected expression over other categories of noncommercial speech without adequate governmental justification, and because the sign code was unjustifiably 'content-based' within the meaning of federal constitutional law."

and that it:

> "...was impermissibly *underinclusive* until the City made the required choice either to regulate murals and billboards alike or to spare regulation (or to take any other constitutional action)." Pet. App. 43-44.

The petitioner has asserted that some "other constitutional action" may be necessary in order not to "burden substantially more speech than necessary to further the government's legitimate interests" *Board of Trustees, State Univ. of N.Y. v. Fox* 492 U.S. 469, 478, or to other wise meet First Amendment concerns.

The idea that billboards have to be regulated the same as other media was addressed by this Court in *Metromedia Inc.* v. *City of San Diego* 101 S.Ct. 2882, 2889, 2890 (1981):

> "Each method of communicating ideas is a 'law unto itself' and that law must reflect the the 'differing natures, values, abuses and dangers' of each method 8 . We deal here with the law of billboards."

> **Footnote** [8] "The uniqueness of each medium of expression has been a frequent refrain: *See, e.g., Southeastern Promotions, Ltd. v Conrad,* 420 U.S. 546, 557, 95 S.Ct. 1239, 1246 43 L.Ed.2d. 448 (1975) ('Each medium of

> expression ... must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems')..."

and:

> "But whatever its communicative function, the billboard remains a 'large,immobile and permanent structure which like other structures is subject to ... regulation.' "

It is clear that each medium of speech must be examined independently to determine what effect a particular regulation will have on the ability of people to exercise their First Amendment rights. A mural is not a "large, immobile and permanent structure..." like a billboard and does not suffer from the same infirmities that billboards do.

Secondly, the idea that 'signs', 'public art', or 'art' in general are defined by content is a fallacy. The Circuit Court based its opinion on flawed definitions of "sign" and "painted wall decorations".While it is within the power of a legislature to define terms for the purposes of identification and regulation, the trouble in this case stems from the definitions in the old sign code. Defining public art by content is flawed in that public art can be a conduit for any speech and is not defined by content. Likewise a billboard is not defined by the speech it displays.

Any image displayed on a billboard that was placed in a frame and displayed in a museum, would be considered 'art'. By the same token, a billboard displaying a painting by Van Gogh would still be a billboard. It is the context, not the content that defines the category. The difficulty comes in when the context is the exterior wall of a building.

V. Art as a Medium of Expression

There is a substantial difference between a content determined category of expression and a medium of expression. Art has been defined within United States Customs Law for the purpose of duty free importation. The Treasury case, *Brancusi v, Unites States* 54 Treas. Dec. 428 (1928) T.D. 43063, expanded the definition of art from purely representational expression to include abstract expression. In doing so, *Brancusi* also freed art from a content related definition previously utilized in Customs Law. Furthermore, a"work of visual art" is also defined in Federal Copyright law (17 U.S.C.A. Sec. 101) as:

> "(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
>
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."

> "A work of visual art does not include -
> (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication or similar publication;
> (ii) any merchandising item or advertising, pro-

motional, descriptive, covering or packing material or container;"

It is clear that a 'sign' is not a "work of visual art" for the purpose of federal copyright law. It is also clear that a "work of visual art" can be defined as distinct from "advertising" or a "merchandising item." These distinctions are not determined by content but by use.

The petitioner has argued that these and other federal, state, and local regulations and programs have defined and identified 'art' as opposed to other modes of expression. It should be possible for the City of Portland to regulate public art apart from signs according to the needs of the City, the public art community and the people of Portland.

VI. Murals Defined

The difficulty of City of Portland in defining murals as opposed to signs, stems at least in part from interpretations of Article I, Section 8, of the Oregon Constitution. There is however, a gray area between signs and murals that makes it difficult to discern one from the other in in some cases. That the exercise is difficult does not mean it is impossible. The defining of a "work of visual art" in the federal copyright code is also a difficult exercise. For instance, a "drawing" is considered a "work of visual art" but a "technical drawing" is not. Both might be identical in that both might be graphite on paper but the purpose and use is different. Likewise, a mural is paint on a wall and so is a painted wall sign. However, the purpose and use of a mural is not the the same as that of a wall sign.

The petitioner provided the Adjustment Committee and LUBA with a possible list of criteria that could be used to define murals. The criteria were based on those used by

Customs Law to identify works of art for the purpose of duty free importation. *See Brancusi v. United States* 54 Treas. Dec. 428 (1928) T.D.43063, and the Harmonized Schedule, U.S.C.A. 1202, Schedule 7, part 11 (West 1978 Supp. 1992)

The criteria presented by the petitioner are:

> "a. how it was produced; b. who produced it; c. the purpose; d. the use; e. whether it is unique and original; and f. whether it is ornamental or has utility."
>
> "Utility would indicate that the application is a sign. Production of revenue by the mere presence of wall copy through a rental agreement, lease or other compensation could be considered a utility or function of a sign." Resp. Rec.at LUBA 127.

The petitioner has argued that the primary purpose for billboards and revenue producing wall signs is the production of revenue. Public art does not produce revenue by its display. It could be a criterion that public art projects cannot directly produce revenue by means of a rental agreement, lease or other financial compensation. This is not a content related decision since money is not content. Anyone can put up a public art mural. While it is true that anyone can also purchase display space on a billboard, it is very expensive and so inaccessible to many due to cost. Murals often spring from disadvantaged communities.

The LUBA decision addresses these issues:

> "Our initial difficulty with petitioner's second argument is that petitioner fails to explain how the city can distinguish public art such as wall murals from other types of signs in a content-neutral manner.

The closest petitioner comes is to assert that:"

> "'The means to distinguish art from signs is to ascertain who produced it, how it was produced, the purpose, the use, whether it is original or unique to the artist, and whether or not it is a commercial sign.' Petition for Review 27"

> "There are at least two problems with the approach petitioner suggests. First it would appear to require city officials to determine under various factors whether a proposed graphic is 'art' or something other than art. Something that might otherwise qualify as 'art' based on 'who produced it, how it was produced, the purpose, [and] the use,' may or may not be 'art,' under petitioner's approach, if it has a 'commercial' purpose or is not 'original or unique.' That approach would appear to distinguish between types of speech based on content, similar to the ordinance at issue in *Ackerley*, which was constitutionally flawed because it distinguished between commercial and noncommercial speech." Pet. App. 13.

The petitioner has proposed criteria that could distinguish between murals and signs. None of those criteria are content dependent. The speech displayed on a billboard is not determined by the fact that a billboard company generates revenue by providing space for speech. We are no talking here about distinguishing commercial speech, religious speech, political speech or any other speech from art. Art is historically a medium through which various content determined categories of speech are expressed. Furthermore, the idea that public art should be "unique" or "original" is not

in any way content related.

It is important to remember that the City Attorney argued against other constitutional options, proposed by the Planning Commission, that would have regulated far less expression. The City Attorney argued that it would be "easier" to defend in court. Is making the City Attorney's job "easier" is a "significant interest" of the government?

Whether or not the petitioner's solution is constitutionally viable, the sign code is still unconstitutional. It is not the responsibility of the petitioner to find a solution to the legislative problem. The constitutional infirmities that plague the sign code are still present.

VII Constitutional Infirmities

The Petitioner raised several constitutional issues concerning the sign code in addition to being unconstitutionally broad and vague.

1. The ordinance was "not narrowly drawn" as required by *Central Hudson Gas & Elec. v. Public Serv. Comm'n* 447 U.S. 557 at 564, 565. *See* Resp Rec. at LUBA 113 -116 or LUBA Rec. 83-85

2. The sign code "restricts a particular category of speakers."*Pineros y Campesinos Unidos* v, *Goldschmidt,* F. Supp. 216 at 221 (D. Or. 1990) *See* Resp. Rec. at LUBA 117 also LUBA Rec. 86.

3. The sign code is unconstitutional because of inherent differences between the two, the two being signs and public art. The petitioner did not cite an authority for this argument. He listed several differences in order to show how public art was impermissibly burdened more than signs. This was also part of a general argument that the sign code was not "narrowly drawn"or a "reasonable fit." I would point out that *Metromedia Inc.* v. *City of San Diego* 101 S.Ct. 2882, 2889,

2890 (1981) does deal with differences of mediums of speech not related to content (*See above* p.21-22) The petitioner does not challenge the constitutionality of the sign code as it relates to signs. *See* Resp. Rec. at LUBA p.116-117 or LUBA Rec. at 85-86.

4. The sign code does not "leave open ample alternative channels for communication of the information." *Virginia Pharmacy Bd.* v. *Va. Council*, 425, U.S. 748, at 771. Although Circuit Court Judge Marcus found, in his opinion, that 566 billboards were adequate channels of expression for AK Media (Pet. App.43-44), the court did not analyze the effect of the sign code on public art. The respondent's brief at LUBA however, does:

> "The City's regulations provide extensive opportunities to engage in speech through signage, while imposing no content-based restrictions on that speech. There is no requirement to independently analyze opportunities for speech related to public art, cruelty to animals, the benefits of vegetarianism, or any other particular topic." p.12, LUBA Rec. 176.

The respondent fails to recognize that art is a medium of speech not a topic of speech. Billboards and revenue producing wall signs are unsuited and financially out of reach for those who use murals as a medium of expression. Only one mural has gone through the sign code adjustment process in six years and many preexisting murals have disappeared or been changed into commercial wall signs.

LUBA did not specifically comment on these points in the Final Opinion and Order.

VIII. Adjustment Criteria

The third assignment of error in the LUBA petition for review argues that the "adjustment criteria are unconstitutional when applied to public art projects because the criteria demand a content related assessment in order to correctly evaluate the application."

"The inappropriateness of the adjustment process is clearly illustrated in criterion c," (LUBA Rec. at 95):

> "**c**. The adjustment will allow a unique sign of exceptional design or style which will enhance the area or which will be a visible landmark." Pet. App. 32.

The findings by the adjustment committee were remarkable for avoiding the analysis required by the criterion. The wording of the criterion is meaningless and misleading because the City cannot constitutionally apply it to murals:

> "**Findings**: The trio of signs will be complimentary in size and will enhance the building wall on which they will be painted. This is because they will fit within existing, equal-sized,recessed panels that are currently featureless elements that appear as an after-thought or as previous storefront windows that were filled in.These signs will enhance the building wall and the area. This criteria is met." Pet. App. 32.

LUBA comments on the third assignment of error:

> "As to petitioner's findings challenge, petitioner faults the city for failing to address whether the proposed mural is a 'unique sign of exceptional design or style.' However, in the next breath petitioner argues that if the city had addressed those

> considerations it would have evaluated the content of the sign and thus committed error. Petitioner cannot have it both ways. Whether or not the city would commit error in addressing whether the proposed mural is a 'unique sign of exceptional design or style,' a point we need not and do not decide, petitioner cannot obtain remand based on the city's failure to address certain considerations when petitioner also argues that addressing those considerations would result in an unconstitutional decision." Pet. App. 17.

The criterion is either meaningless and cannot be constitutionally applied to public art or the city failed to ascertain whether or not the mural in question was a 'unique sign of exceptional design or style' as required by the criterion. Either way, the findings and criterion are flawed.

The criterion is unconstitutionally vague and broad when applied to public art according to the First, Fifth and Fourteenth Amendments because there is no way by reading it to understand what the findings will actually address. The criterion may be appropriate in evaluating signs but cannot be constitutionally applied to public art. This dilemma is another example of the influence of the case law flowing from Article I. Section 8 of the Oregon Constitution.

IX. Conclusion

Portland's Title 32 continues to unconstitutionally chill the production of public art expression in the City of Portland as it has for six years. This review is necessary in order to determine whether it is possible to legislate a reasonable policy that permits the people of the City of Portland to express themselves through public art.

This petition for a writ of certiorari should be granted.

Respectfully Submitted Joseph Cotter

Joseph Cotter / Petitioner
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Eagle Creek, Oregon 97022
Telephone: (503) 637-3381

On this day, 24th of December, 2004

APPENDIX

APPENDIX

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Pet. App. 1

IN THE SUPREME COURT OF THE
STATE OF OREGON

JOSEPH COTTER Petitioner/Petitioner	
	ORDER DENYING
v.	REVIEW
CITY OF PORTLAND Respondent/Respondent	CA A124365 SC S51642

The Court has considered the petition for review and orders that it be denied.

Date: September 28, 2004

/ S / WALLACE P. CARSON JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

COPIES TO:

JOSEPH COTTER Attorney for Petitioner/Petitioner
PETER A KASTING Attorney for Respondent/Respondent

FILED: June 30, 2004

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

JOSEPH COTTER,	
Petitioner,	LUBA No. 2003-062
v.	
CITY OF PORTLAND	A124365
Respondent.	

Argued or submitted on briefs: June 4, 2004
Before Edmonds, Presiding Judge, and Wollheim and Schuman, Judges
Attorney for Petitioner: Joseph Cotter *pro se*
Attorney for Respondent: Peter A. Kasting

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[X] Costs allowed, payable by: Petitioner

Pet. App. 3

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH COTTER,
Petitioner,

Vs.

CITY OF PORTLAND
Respondent.

LUBA No. 2003-062

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Joseph Cotter, Eagle Creek, filed the petition for review and argued on his own behalf.

Peter A. Kasting, Chief Deputy City Attorney, Portland, filed the response brief and argued on behalf of the respondent.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED 03/19/2004

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals an adjustment committee decision denying his appeal of an administrative decision approving an adjustment to the maximum size allowed for a sign.

MOTION TO FILE REPLY BRIEF

On February 19, 2004, the date of oral argument, petitioner filed a motion seeking permission to file a reply brief to address several alleged new matters in the response brief, which had been filed February 11, 2004. Petitioner's motion was not accompanied by the proposed reply brief, as required by OAR 661-010-0039; the reply brief was filed several days later, on February 23, 2004.

The city opposes the motion, on the grounds that it was not accompanied by the proposed reply brief and, in any case, the motion is untimely. The city argues that filing a reply brief 12 days after the response brief was filed violates the OAR 661-010-0039 requirement to file the reply brief "as soon as possible after respondent's brief is filed" and, further, filing the reply four days after oral argument deprives the city of any opportunity to respond.

We agree with the city that petitioner's motion must be denied as untimely, LUBA's expedited schedule of review provides only a limited window of time in which to file a reply brief. A reply brief filed 12 days after the response brief was filed, and four days after oral argument, is not filed "as soon as possible" after the filing of the respondent's brief. Accepting the reply brief under these circumstances would prejudice the city's substantial right to an adequate opportunity to present its position in this proceeding. The motion to file a reply brief is denied.

Pet. App. 5

MOTION TO TAKE EVIDENCE

Petitioner moves to take evidence not in the record pursuant to OAR 661-010-0045[1] The extra-record evidence petitioner wishes us to consider consists of (1) an affidavit from an applicant for a different sign from the one at issue here, with attachments, and (2) an exchange of e-mails between petitioner and a city planner. In addition, petitioner seeks to take the depositions of the city attorney, the director of the city Bureau of Development Services, and two city planners. According to petitioner, the proffered evidence and sought-after testimony would establish that the city has in the past construed the term "image" in the code definition of "sign" to include representational images but to exclude abstract images, an interpretation that petitioner advances in the petition for review.

---

[1]OAR 661-010-0045 provides, in relevant part:

"(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' brief concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.187, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197. 845

"(2) Motion to Take Evidence

"(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how these facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding

The city responds, and we agree, that petitioner has not established a basis to consider evidence outside the record. A necessary condition for application of OAR 661-010-0045 is that the proponent establish that there are "disputed factual allegations" between the parties. A dispute regarding interpretation of the law or the legal conclusions to be drawn from undisputed facts does not warrant taking extra-record evidence under OAR 661-010-0045. *Meredith v. Lincoln County*, 44 Or LUBA 821, 827 (2003); *Jones v. Lane County*, 27 Or LUBA 654, 655 (1994). Here, the pertinent dispute between the parties is over the scope and interpretation of the term "image in the city's sign code, and the legal consequences that flow from different interpretations. Further, we agree with the city that the fact petitioner wishes to establish-that city staff have in the past interpreted "image" consistently with petitioner's interpretation-has no discernable bearing on the issues in this appeal, and thus petitioner has failed to establish that our consideration of extra-record evidence "will affect the outcome of the review proceeding." OAR 661-010-0045(2)(a). The motion to take evidence is denied.

FACTS

The subject property is developed with a commercial building. In 2001, the property owner and others applied to the city for a sign permit to allow a mural to be painted in the center of three panels along one wall of the building. The city approved the permit for a 122-square foot mural, and subsequently a 129-square foot mural was painted in the center panel.

In 2003, the property owners and others, including petitioner, applied for a sign permit to include the existing

mural and two new murals on either side of the existing mural, totaling 388 square feet. The proposed signs exceed the total amount of sign area allowed per building and the maximum amount of area per sign, under the city's sign code. Accordingly, the applicants requested an adjustment under the criteria at Portland City Code (PCC) 32.38.030(C).[2]

A staff planner administratively approved the requested adjustment. Petitioner then appealed the staff decision to the adjustment committee, challenging the constitutionality of the applicable sign regulations and the requirements for an adjustment. The adjustment committee held hearings March 4, 2003, and March 18, 2003, and at the conclusion of the March 18, 2003 hearings voted to deny the appeal and uphold the staff decision approving the requested

---

[2]PCC 32.38.030(C) provides, in relevant part:

> "Sign adjustments will be approved if the review body finds that the applicant has shown that the criteria of Paragraph C.1. or C.2, below are met
>
> "1. Area enhancement. The applicant must meet criteria C.1.a. and b. and either C.1.c. or d.
>
> "a. The adjustment for the proposed sign will not significantly increase or lead to street level sign clutter, to signs adversely dominating the visual image of the area, or to a sign which will be inconsistent with the objectives of a specific plan district or design district; and
>
> "b. The sign will not create a traffic or safety hazard; and
>
> "c. The adjustment will allow a unique sign of exceptional design or style which will enhance the area or which will be a visible landmark; or
>
> "d. The adjustment will allow a sign that is more consistent with the architecture and development of the site."

adjustments. The committee adopted written findings on April 1, 2003. The committee's decision declines to review petitioner's constitutional challenges to the city's sign code, as beyond the committee's scope of review.

This appeal followed.

FIRST ASSINGMENT OF ERROR

In reciting the facts leading up to the proposal, the challenged decision states the following:

> "In 2001, the applicants applied for a Sign Permit to allow a sign to be painted on the east wall of the their commercial building located at the intersection of SE Foster Road and SE 65th Avenue. The permit was approved for a 122 square-foot painted sign, however, the final permit was not applied for, was not issued, and is thus void. Subsequently, a 129 square-foot sign was painted on the east wall without the required permit; therefore, the existing painted wall sign is not legal." Record 2-3.

Petitioner argues that the city's conclusion that the existing mural is not legal is incorrect and not based on substantial evidence supporting the city's findings that the 2001 final permit "was not applied for, was not issued and is thus void."

The city responds that the decision on appeal is an adjustment decision to allow a total of 338 square feet of sign area, an adjustment that would be necessary even if the existing mural had a valid permit. Therefore, the city argues, the challenged statement that the 2001 final permit "was not applied for, was not issued, and is thus void" and the challenged conclusion that the existing mural is illegal are

irrelevant to the adjustment criteria and are mere surplusage. Because the challenged findings are not critical to the city's decision, the city argues, any error in those findings or lack of evidentiary support for those findings is not a basis for reversal on remand.

Like the city, we do not see that the challenged statements, even if erroneous or unsupported by the record, are relevant to the applicable criteria or otherwise critical to the city's decision. There is no dispute that even if the existing mural had a valid permit the applicants must seek adjustments under the same criteria to approve the size of the other two murals and to exceed the maximum sign area of the building, including the existing mural. As far as petitioner has established, whether the existing mural has a valid permit plays no role under the applicable criteria or the city's decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city's sign code, specifically the code definition of "sign," is unconstitutional on its face, and is inconsistent with comprehensive plan policies governing public art.

A. Constitutional Issues

Petitioner explains that prior to 1999, the city's sign code did not regulate public art such as murals. In 1999, the Multnomah County Circuit Court ruled in *AK Media Group, Inc. v City of Portland*, No. 9801-00125 (*AK Media*), that the then-current definition of "sign" was inconsistent with Article I, Section 8 of the Oregon Constitution, because it excluded public art such as wall murals from regulation under the sign code, while imposing regulations on other

signs such as billboards.[3] Following that decision, the city amended the code definition of 'sign' to read as it does today:

> "Materials placed or constructed, or light projected, that (1) conveys a message or image and (2) is used to inform or attract the attention of the public. Some examples of 'signs' are materials or lights meeting the definition of the preceding sentence and which are commonly referred to as signs, placards, A-boards, posters, billboards, murals, diagrams, banners, flags, or projected slides, images or holograms The scope of the term 'sign' does not depend on the contents of the message or image conveyed."

Petitioner argues that subjecting public art such as wall murals to the size and other regulations applicable to "signs" is inconsistent with Article I, section 8 of the Oregon Constitution, for two reasons.[4] First, petitioner argues that the term "image" in the definition of "sign" refers only to representational images, not abstract images, and thus the definition of sign impermissibly distinguishes between representational art and non-representational art. According to petitioner, imposing regulations on one kind of speech and no regulations on other kinds of speech, based on the difference in content, is inconsistent with Article I, section 8. See *Ackerly Communications, Inc. v Mult. Co.*, 72 Or App 617, 623-24, 696 P2d 1140 (1985), *rev dismissed* 303 Or 165, 734 P2d 885 (1987) (an ordinance that regulates and

---

[3] A copy of the circuit court opinion is appended to the city's brief at Appendix 1-66.

[4] Article 1, section 8 on the Oregon Constitution provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatsoever[.]"

limits billboards with "commercial" content but that allows without regulation billboards with "noncommercial" content violates Article I, section 8). Therefore, petitioner argues, the city cannot impose the size regulation and other regulations applicable to "signs" on representational art, a category that apparently includes the wall murals at issues in the present case.

Second, petitioner contends that the city went too far in including public art within the scope of "signs." Petitioner recognizes that the circuit court found in *AK Media* that the former code definition of "sign," which excluded public art such as wall murals from regulation, violated Article I, section 8. However, petitioner argues that the circuit court did not order the city to remedy that violation by including public art within the category of "signs." According to petitioner, while the circuit court did rule that the plaintiff in that case was entitled to compel the city to choose between "deregulation signs along with murals or regulating murals with signs," the court expressly left open the possibility that the city could "arrive at some other constitutional response." *AK Media*, slip op 55, n 63. Petitioner contends that the city failed to recognize that it is possible (indeed constitutionally required, in petitioner's view) to regulate public art as something other than "signs," without relying on content-based distinctions. Petitioner argues that the production of public art such as wall murals has essentially ground to a halt since 1999, under the current code definition, and that the city's choice to regulate wall murals as signs has so burdened a particular form of speech, public art, that the code definition violates Article I, Section 8. Citing to cases under the Free Expression Clause of the First Amendment to the United States Constitution, petitioner argues that the code definition (1) is not a "reasonable fit" with respect to and does not advance the city's "substantial interests," (2) is impermissibly broad and vague, (3) impermissibly burdens

speech by muralists, and (4) fails to leave open ample alternative channels of communication.

As petitioner recognizes, his first and second arguments are somewhat in tension. Petitioner first contends that the code definition does not go far enough, because it regulates representational art but not abstract, and thus makes a constitutionally infirm content-based distinction. Under the second line of reasoning, the code definition goes too far in sweeping public art such as wall murals into the regulations governing signs. According to petitioner, it is possible to distinguish between wall murals and "signs" without reference to content. We understand petitioner's first and second arguments to be framed as alternatives.

The city disputes petitioner's premise that the sign definition regulates representational images but excludes abstract or non-representational images. According to the city, the term "image" is not limited to representational images. We agree with the city that nothing in the sign code drawn to our attention narrows the scope of the term "image" to exclude abstract or non-representational images. Therefore, petitioner's first argument does not provide a basis for reversal or remand.

The gist of petitioner's second line of argument is that there are content-neutral ways to distinguish wall murals from "signs" and that the city is required to adopt these ways in order to avoid a host of constitutional difficulties allegedly caused by regulating wall murals as signs. We understand petitioner to argue that if the view expressed in the city's brief is correct-that the definition of "sign" includes both representational and non-representational images-then the scope of speech regulated by the sign code is even broader and hence more susceptible to constitutional infirmity than petitioner's first argument would suggest. In addition, petitioner cites to comprehensive plan policies that petitioner reads to encourage public art. According to petitioner, in order to be consistent with the cited comprehensive plan

policies the city cannot place the same burdens on wall murals as it places on other types of graphic speech, such as commercial billboards.

Our initial difficulty with petitioner' second argument is that petitioner fails to explain how the city can distinguish public art such as wall murals from other types of signs in a content-neutral manner. The closest petitioner comes is to assert that:

> "The means to distinguish public art from signs is to ascertain who produced it, how it was produced, the purpose, the use, whether it is original or unique to the artist, and whether or not it is a commercial sign." Petition for Review 27.

There are at least two problems with the approach petitioner suggests. First, it would appear to require city officials to determine under various factors whether a proposed graphic is "art" or something other than art. Something that otherwise might qualify as "art" based on "who produced it, how it was produced, the purpose, [and] the use," may not be "art," under petitioner's approach, if it has a "commercial" purpose or it is not "original or unique." That approach would seem to distinguish between types of speech based on content, similar to the ordinance at issue in *Ackerly*, which was constitutionally flawed because it distinguished between commercial and noncommercial speech. Further, petitioner's approach would appear to give city officials unlimited discretion in deciding what graphics constitute "public art" and were hence free from regulation, and what graphics constitute something other than art, and were therefore subject to size and other regulations. It is questionable whether an ordinance granting city officials such discretion to approve or deny sign applications would be consistent with constitutional requirements. *See Desert*

Outdoor Advertising Inc. v. City of Moreno Valley, 103 F3d 814, 818 (9th Cir 1996), *cert. den.* 522 US 912, 118 S Ct 294, 139 L Ed 2d 227 (1997) (subjective sign standards requiring a determination that proposed signs will not be detrimental to the "aesthetic quality" of the community grants city officials "unbridled discretion" to approve or deny speech, in violation of the Federal First Amendment).

In the absence of a control-neutral way of distinguishing wall murals from other signs, as the circuit court noted, the city's regulatory choice lies between deregulating signs altogether or deregulating murals along with signs. The city has chosen the latter course. As relevant here, the effect of that choice is that wall murals are subject to the same size restrictions as other types of signs, with larger types permitted under the city's adjustment process. That choice may burden graphic expression by wall muralists, but it does so only to the extent other types of constitutionally protected expression are burdened. The breadth and even-handedness of the city's sign regulation is necessary in order to regulate signs in a manner consistent with Article I, section 8. Petitioner does not argue, and we do not see that it is the case, that the only constitutionally permissible choice for the city is to deregulate all signs, including murals. Nor do we see that the city comprehensive plan policies cited by petitioner compel the city to favor public art over other types of expression, even if such favoritism would pass constitutional muster. In short, petitioner's second line of argument fails to provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner contents that the adjustment criteria the city applied in approving the size of the proposed mural require the city to assess the content of the proposed sign and

therefore application of those criteria violate Article I, section 8, for the same reasons expressed under the second assignment of error. In addition, petitioner argues that the city has failed to demonstrate that the adjustment criteria can be imposed "only in a clear and objective manner," pursuant to ORS 197.831[5] Finally, petitioner contends that the city's findings inadequately articulate why the proposed mural meets the adjustment criteria.

The applicable adjustment criteria are quoted above in footnote 2. Petitioner's arguments focus on PCC 32.38.030(C)(1)(c), which requires a finding that the adjustment "will allow a unique sign of exceptional design or style which will enhance the area or which will be a visible landmark." The city's findings with respect to PCC 32.28.030(C) (1)(c) state:

> "The trio of signs will be complimentary in size and will enhance the building wall on which they will be painted. This is because they will fit within existing, equal-size, recessed panels that are currently featureless elements that appear as an afterthought or as previous storefront windows that were filled in. The signs will enhance the building wall and the area. This criterion is met." Record 6

We have rejected petitioner's arguments under the second assignment of error that regulation of wall murals

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[5] ORS 197.831 provides:

> "In a proceeding before [LUBA] or on judicial review from an order of the board that involves an ordinance required to contain clear and objective approval standards for a permit under ORS 107.307 and 227.175, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards are capable of being imposed only in a clear and objective manner."

under the city's sign code, including imposition of size restrictions, is unconstitutional because it requires the city to assess the content of the proposed mural. As a consequence, if we agree with petitioner that the adjustment criteria are unconstitutional, it would seem to follow that petitioner's application must be denied, because the proposed mural unquestionably exceeds the applicable size limitation. Be that as it may, we disagree with petitioner that the adjustment criteria at PCC 32.28.030(C) (1)(c) require inquiry into the content of the proposed sign, or that the city's review in the present case inquired into the contents of the proposed sign.

First, as the city notes, PCC 32.28.030(C) requires that, notwithstanding any other code provisions, reviews of adjustment applications with respect to sign will be content-neutral, without reference to message, category, subject, topic or viewpoint.[6] Thus, even if the terms of PCC 32.28.030(C)(1)(c) required inquiry into the content of a proposed sign, PCC 32.28.030(C) would apply to prohibit such inquiry. Second, while PCC 32.28.030(C)(1)(c) has subjective elements in it ("unique sign of exceptional design or style"), we do not see that application of PCC 32.28.030(C)(1)(c) necessarily requires that the city review the contents of the sign and approve or deny the sign based on content. In any case, even if review under PCC 32.28.030(C)(1)(c) necessarily involves evaluation of the content of the sign, it is clear in the present case that the city did not do so. The above-quoted findings focus, as PCC 32.28.030(C) directs, on the structural setting and placement of the sign and, as portions of PCC 32.28.030(C)(1)(c) direct,

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[6] PCC 32.28.030(C) provides:

"**Content-Neutral Administration of Land Use Reviews.** Notwithstanding any other provision of this Title or of related standards referenced in this Title, applications for adjustments, design review, and historic design review for signs will be reviewed only with respect to sign structure or placement, or with reference to copy only to the extent of color or typeface and excluding any reference to message, category, subject, topic or viewpoint."

on whether it will "enhance the area" The findings do not address whether the sign is a "unique sign of exceptional design or style." We discuss, below, petitioner's challenge to the adequacy of the city's findings with respect to that aspect of PCC 32.38.030(C)(1)(c).

As to ORS 197.831, we agree with the city that petitioner has not established that the sign adjustment criteria Are "required to contain clear and objective approval standards for a permit under ORS 197.307 and 227.175," within the meaning of that statute. Therefore, the fact that the sign adjustment criteria include subjective elements has no bearing on this assignment of error.

As to petitioner's challenge, petitioner faults the city for failing to address whether the proposed mural is a "unique sign of exceptional design or style." However, in the next breath petitioner argues that if the city had addressed those considerations it would have evaluated the content of the sign and thus committed error. Petitioner cannot have it both ways. Whether or not the city would commit error in addressing whether the proposed mural is a "unique sign of exceptional design or style," a point we need not and do not decide, petitioner cannot obtain remand based on the city's failure to address certain considerations when petitioner also argues that addressing those considerations would result in an unconstitutional decision. Petitioner has not demonstrated any inadequacy in the city's findings of compliance with PCC 32.38.030(C)(1)(c) that provide a basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The City's initial administrative decision imposed a condition limiting lighting to a single existing light over the existing panel. That condition was based on PCC

32.38.030(C)(1)(a), which requires a finding that the proposed sign will not adversely dominate the "visual image of the area." *See* n 2.[7] Petitioner did not challenge that condition or the findings under 32.38.030(C)(1)(a) in filing the local appeal to the adjustment committee. The notice of the hearing before the adjustment committee did not list lighting as a potential subject of the hearing. However, during the hearing before the adjustment committee petitioner argued that the committee should remove the condition and approve additional lights in order to make the mural a more "visible landmark" for the purposes of PCC 32.38.030(C)(1)(a).

During deliberations, three of the five adjustment committee members indicated that they would approve additional lighting. However, one committee member changed his mind after the committee chair voiced concern that the proposed mural faces residential property and the notice of hearing said nothing about additional lights.[8] The committee voted immediately after that exchange to deny the

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[7] The adjustment committee's decision adopts the following findings with respect to PCC 32.38.030(C)(1)(a):

> "* * * [L]ighting of the signs could result in visually dominating the area at nighttime. Therefore, a condition is warranted that no additional lighting beyond what currently exists (the two-bulb spotlight above and aimed at the existing, middle, painted sign) or that which would have the effect of lighting the signs, is allowed on the east wall (I.e., a light above the door that accesses the second story residences/offices would be allowed." Record 6.

[8] The summary of the March 18, 2003 adjustment committee's hearing states in relevant part:

> "[Committee Member Brockman]: We could amend the adjustment to change the lighting to acknowledge the mural. Uniform lighting would be good.
>
> "[Committee Member Beardsley]: Allow lighting to be uniform.

Appeal and uphold the administrative decision, including the condition limiting lighting of the mural.

Although the issue of additional lighting had not been raised in the notice of appeal and hence was not listed in the notice of hearing sent to adjoining property owners, petitioner argues that the committee erred in refusing to consider that issue. According to petitioner, the proceeding before the adjustment committee was a *de novo* hearing on a permit application for purposes of ORS 227.175(10)(a)(E), which requires in relevant part that the issues considered may not be limited to legal issues that are specified in the local notice of appeal.[9] Petitioner argues that ORS

> "[Committee Member Davidson]: The street is not a through street [so] it would be [all right].
>
> "[Committee Chair Allen]: States concern, that the appeal did not request change in the conditions of approval.
>
> "[Member Beardsley]: What about additionally enhancing the area?
>
> "[Chair Allen]: The trouble I have with that is the fact that it faces other properties. They got legal notice and nothing was said about additional lights.
>
> "[Member Broakman]: Agrees and changes mind." Record 182.

[9] ORS 227.175(10)(a)(E) was adopted by the legislature in 1999 to overrule the Court of Appeals' decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 p2d 978 (1997). *Haug v. City of Newberg*, 42 Or LUBA 411, 418 n 7 (2002). In *Johns*, the court held that a local appellant seeking review of a city permit decision rendered without a hearing must identify the issues to be raised with the local appellate body in the local notice of appeal. ORS 227.175(10)(a)(E) provides:

> "The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to [LUBA[. At the de novo hearing:

227.175(10)(a)(E) requires the city to consider the merits of petitioner's argument that additional lighting is warranted under PCC 32.38.030(C)(1)(c), and adopt findings resolving that issue.

The city does not respond to petitioner's procedural or findings challenge, but instead argues on the merits that nothing in the adjustment criteria compels the city to approve additional lighting, and that the condition limiting lighting is warranted under PCC 32.38.030(C)(1)(a). That may be, but petitioner appears to be correct that the adjustment committee felt it could not or should not consider the merits of petitioner's argument, and the committee failed to adopt findings addressing that issue. ORS 227.175(10)(a)(E) allows issues to be raised even if those issues were not specified in the notice of appeal, and further requires the city to consider all testimony and evidence accepted at the hearing. In addition, where specific issues are raised below concerning compliance with an approval criterion, the findings supporting the decision must respond to those issues. *Norvell v. Portland Area LGBC,* 43 Or App 849, 853, 604 P2d 896 (1979); *Heiller v. Josephine County,* 23 Or LUBA 551, 556 (1992). Accordingly, we agree with petitioner that remand is necessary for the city to adopt findings addressing the issue raised below regarding whether additional lighting is warranted under PCC 32.38.030(C)(1)(c) and, if so, weather

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"(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have in a hearing under subsection (3) of this section before the decision;

"(ii) The presentation of testimony, arguments and evidence *shall not be limited to issues raised in a notice of appeal;* and

"(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing." (Emphasis added.)

that additional lighting would be consistent with PCC 32.38.030(C)(1)(a).

The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

Petitioner explains that, following the adjustment committee decision in this case, the committee wrote a letter to the city council expressing concerns about the regulation of wall murals under the city code. Petitioner contends that the adjustment committee letter has a bearing on the present case and that the letter and the concerns expressed within the letter should be viewed as part of the adjustment committee's final decision with respect to the wall mural at issue here. Accordingly, the petitioner argues that the committee erred in failing to include the letter or concerns expressed in the letter in the findings supporting the challenged decision.

The city responds, and we agree, that the adjustment committee's findings properly addressed only the criteria applicable to the proposed mural. As far as petitioner has established, the policy concerns expressed in the adjustment committee letter have no direct bearing on whether the mural at issue in this case complies with applicable adjustment criteria, and the city did not err in not including that letter or the concerns expressed therein as part of the challenged decision.

The Fifth assignment of error is denied.

The City's decision is remanded.

seal City of Portland, Oregon 1851

City of Portland
BUREAU OF DEVELOPMENT SERVICES
Land Use Review Division

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Notice of Final
Findings, Conclusions and Decision
of the City of Portland Review Body
on an Appealed Administration Decision
(Type II Process)

The administrative decision for this case was appealed to the Portland Adjustment Committee by the applicant. The original administrative analysis, findings and conclusions were adopted by the Adjustment Committee and are restated below.

I. Central Information

Applicants: Ronald K Rowe Trust, property owner
PO Box 209, Medina Wa 98039-0209

Sergei Pereverzina, restaurant lessee
6433 SE Foster Rd. Portland, OR 97201

Joseph Cotter, 31810 SE Wildcat Mt. Dr.
Eagle Creek, OR 97022, (503) 630-5176

Site Address: 6433-6439 SE Foster Road

Legal Description: ARLETA PK 3; EXC W 17' & EXC N 15' OF E 83' LOT 1 BLOCK 9

Tax Account No.: R036902180

State ID No.: 1S2E17BB

Quarter Section: 3537

Neighborhood: Foster-Powell contact Ken Pliska at (503) 775-9101

Business District: Foster Area, contact Ken Turner at (503) 771-3817

District Coalition: Southeast Uplift contact Judith Gonzalez-Plascencia (503)232-0010

Zoning: CS (Storefront Commercial)

Other Designations: Foster Avenue is a Major Transit & Traffic Street

Case Type: Adjustment (AD)

Proceeder: Type II (Administrative decision with appeal to the Adjustment Committee)

Proposal:

In 2001, the applicants applied for a Sign Permit to allow a sign to be painted on the east wall of their commercial building located at the intersection of SE Foster Road and SE 65th Avenue. The permit was approved for a 122 square-foot painted sign, however, the final permit was not applied for, was not issued and is thus void. Subsequently, a 129 square-foot sign was painted on the east wall without the required permit; therefore, the existing painted wall sign is not legal.

Currently, the applicants propose the existing sign and two additional signs to be painted on either side of the existing one. In addition to the existing above-mentioned painted sign along 65th Avenue, there are existing fascia signs along the Foster Road frontage.

The proposed and existing signs are subject to the regulations of Title 32, the Portland Sign Code. Table 32.32-2 limits the amount of sign area attached to buildings to 1 1/2 square feet per 1 foot of primary building wall, if there is no freestanding signs along the Foster Road frontage (primary building wall). Because the primary wall is 95.5 feet long, 143.25 square feet of sign area is allowed, to be divided between the SE 65th and SE Foster frontages. According to the 2001 application for a sign permit, the applicant indicates there is 21.25 square feet of signs along SE Foster Road. The current application shows that the existing sign painted on the wall along the 65th Avenue frontage contains 129 square feet. The proposal is for an additional 238 square feet of signs (one new sign at 110 square feet and one at 128 square feet), for a total of 388.25 square feet of sign area for the building. The proposed and existing signs exceed the maximum allowed amount of signs by 245 square feet.

Table 32.32-2 also limits the maximum area per sign in the CS zone to 100 square feet. The area of each of the proposed signs on the east side of the building is 110 square feet and 128 square feet, and the existing sign is 129 square feet.

The applicants have requested an adjustment to the sign regulations in order to exceed the total amount of sign area allowed per building and to exceed the maximum amount of area per sign for each of the three signs to be painted on the east wall of the building.

Subsequent to mailing the staff decision on this adjustment request, and prior to the initial appeal hearing before the Adjustment Committee, it was discovered that there is more than 21.25 square feet of signs along SE Foster Road. Rather, that amount is 140 square feet. The total existing and proposed sign area on both faces of the building is 507 square feet. (See Section titled Appeal/Public Hearing below for additional information.)

Relevant Approval Criteria
In order to be approved, this proposal must comply with the applicable approval criteria of Title 32.38.030-
Sign Adjustment Review.

II. ANALYSIS

Zoning, Site and Vicinity: The site and surrounding area is zoned CS, Commercial Storefront. This is a commercial zone that encourages a storefront character with buildings close to, and oriented towards, sidewalks especially at corners. Development is intended to be pedestrian-oriented. The zone allows for a full range of retail, service and business uses with a local or regional market area. Development and uses are regulated by the Portland Zoning Code, Title 33.

Signs are regulated by the Portland Sign Code, Title 32. Title 32 defines a 'sign' as "Materials placed or constructed, or light projected, that (1) conveys a message or image and (2) is used to inform or attract the
attention of the public." The scope of the term 'sign' does not depend on the content of the message or image conveyed. Even though the applicant's proposal does not include words or logos, it does project an 'image' and is considered a 'sign'.

Section 32.38.010.C states that applications for sign adjustments will be reviewed only with respect to sign structure or placement, or with reference to copy only to the extent of color or typeface and excluding any reference message, category, subject, topic or viewpoint.

The 3,411 square-foot, triangular-shaped site is developed with a two-story building that was built prior to 1900 (before building records were kept). The street level portion of the building contains a restaurant and the second level contains office and residential uses. The building is located adjacent to the sidewalks and is approximately 22 feet high with a flat roof. There are bay windows on the second floor. The front of the building (facing SE Foster Road) contains the main pedestrian entrance and large 8' X 10' windows (some of which have been tinted). On the east side of the building facing SE 65th Avenue, there is one panel of tinted window area, a rear pedestrian entrance and three recessed panels, all 11-feet tall and ranging from 10 feet 1 inch to 11 feet 9 inches wide. Within the middle panel (11' 9" x 11'), is the existing sign that was painted directly on the wall surface. From photographs submitted with the application packet, It appears this sign is lighted from above by a two-bulb spotlight. The two panels on either side of the painted panel (10' 1" x 11' and 11' 8" by 11') are currently painted to match the rest of the building, in a solid color.

The subject property is located on the northwest corner of SE Foster Road and SE 65th Avenue. Adjacent to the southwest, SE Foster Road is designated a Major City Traffic Street, a Major City Transit Street, a City Walkway and a Minor Truck Street. This street has a right-of-way width of 95 feet and is improved with 60 feet of paving, curbs, (and adjacent to the site) a 17-foot sidewalk and 6

inches between the sidewalk and the front property line. Adjacent on the east, SE 65th Avenue is a one-way Local Service Street that continues
north of Foster Road for only one block. This street has a right-of-way width of 50 feet and is improved with 28 feet of paving, curbs, 11-foot sidewalks and no right-of-way between the sidewalks and the private property lines.

The area within 300 feet of the site is developed with one- and two-story commercial buildings. In addition, there is a mix of single-dwelling and small multi-dwelling residential properties facing SE 65th and 66th Avenue to the northeast of the site. Immediately to the north and west of the site, there is a two-story commercial building mainly facing SE 65th Avenue, but with a pedestrian access on Foster Road. Across the street to the east of the site, there are two-story commercial buildings. Across the street to the southwest, there is a mix of one- and two-story commercial buildings.

Land Use History: City records indicate there are no prior land use reviews for this site.

Agency Review: A"Notice of Proposal in Your Neighborhood" was mailed on November 29, 2002 to concerned agencies. The following Bureaus have responded with no issues or concerns;
. Bureau of Environmental Services
. Portland Transportation
. Fire Bureau

Neighborhood Review: A "Notice of Proposal in Your Neighborhood" was mailed on November 29, 2002 to the neighborhood associations and to the property owners within 150 feet of the site. Prior to the publication of the

staff decision, one letter of support of approving the adjustment was received from the Foster-Powell Neighborhood Association.

Appeal/Public Hearings: The applicant Joseph Cotter appealed the staff's Administrative Decision approving his application for an adjustment to exceed the maximum permissible sign area. Mr. Cotter challenged the constitutionality of the sign regulations applicable to the proposed signs and the requirement for an adjustment from the maximum sign area and size limits for those signs. The Adjustment Committee's review, however, was limited to determining whether the Administrative Decision correctly applied the approval criteria for the requested adjustment, based on the facts. Issues concerning the constitutionality of the City's sign regulations are beyond the scope of the Committee's review.

On March 4, 2003 the Portland Adjustment Committee held a public hearing on this case. The Chair opened the hearing and staff showed photographs of the site and area. Staff noted new correspondence from the applicant/appellant had been received and recommended to the Committee that the appeal be denied and the Administration Decision of approval with condition be upheld. Staff also noted that the original Notice of Proposal and Notice of Decision contained inaccurate information about the amount of the existing signs on the SE Foster Road facade of the building. Staff indicated a new notice was being mailed that day (March 4th) which included the correct amounts. A second, continued hearing was scheduled for March 18th in order to allow for additional written or oral testimony in light of the new information. Mr. Cotter submitted an extension to the 120-day clock, allowing for a decision to be made after April 1, 2003. Public

testimony was heard from the applicant/ appellant and other persons supporting the appeal. There was no testimony in opposition to the adjustment request or to the appeal. The hearing was continued.

On March 18, 2003 the hearing resumed. The chair asked staff if additional testimony had been received. The only new information received was from applicant/appellant and was distributed to the Committee at the outset of the March 18th hearing. The appellant spoke, there was additional oral testimony in support of the appeal and the appellant had the opportunity to rebut. The Chair closed public testimony and the Committee discussed the merits of the case. A motion was made and seconded to deny the appeal and uphold the Administrative decision. The Committee voted unanimously to deny the appeal and to uphold the Administrative Decision of approval with condition. Staff was instructed to return the Committee Findings on April 1, 2003.

ZONING CODE APPROVAL CRITERIA

32.38.030 Sign Adjustment Review

A. Purpose. Sign adjustments are intended to allow flexibility to the sign regulations while still fulfilling the purpose of the regulations. The specific approval criteria allow signs that enhance the overall character of an area or allow for mitigation of unusual site conditions.

B. Procedures. The adjustment procedures stated in Chapter 33.805, Adjustments, apply to sign adjustments. However, the approval criteria of this section are used, rather than of those of Chapter 33.805 of the Zoning Code.

C. Approval Criteria. Sign adjustments will be approved if the review body finds that the applicant has shown that the criteria of Paragraph C.1 or C. 2, below are met. The applicants have chosen to address paragraph C.1.

1. Area Enhancement: The applicant must meet criteria ***a*** and ***b*** and either ***c*** or ***d***.

a. The adjustment for the proposed sign will not significantly increase or lead to street level sign clutter to signs adversely dominating the visual image of the area, or to a sign which will be inconsistent with the objectives of a specific plan district or design district; and

Findings: The scope of this review is limited to sign structure, size or placement and any impact on sign clutter. This land use review must view the signs as content neutral. Staff finds that the signs will not significantly increase or lead to street level sign clutter for the following reasons: 1) the signs are adjacent to a Local Service Street and are oriented to the commercial area on 65th Avenue rather than the SE Foster, 2) the signs are painted directly onto the ground level wall thereby limiting the scope of impact. 3) the signs will be contained within the existing architectural framework of the wall (recessed panels) and will not encroach onto the bordering pilasters, and 4) the signs are generally the same size, thereby providing a sense of balance and reduction in clutter. However, lighting if the signs could result in visually dominating the area at nighttime. Therefore, a condition is warranted that no additional lighting beyond what currently exists (the two bulb spotlight

above and aimed at the existing, middle, painted sign) or that which would have the effect of lighting the signs, is allowed on the east wall (i.e. a light above the door that accesses the second story residences/offices would be allowed).

The site is not located within a specific plan or design district. The applicant states that the proposal is not inconsistent with the objectives of the Foster-Powell Neighborhood Plan, the Outer Southeast Community Plan or the Community Design Guidelines and further addressed Goal 12 of the Comprehensive Plan. Because these plan documents are not relevant approval criteria, this report does not include any analysis of them. However, because the proposal will not increase street level sign clutter if implemented as proposed and with a condition disallowing additional lighting of the proposed signs, this criterion can be met.

b. The sign will not create a safety hazard; and

Findings: In their response to the Notice of Proposal, Portland Transportation Development Review indicates that the location of the proposed signs will not impact transportation services and that there are no objections to approval of the adjustments. The signs will be on the ground level of the building, adjacent to a one-way right-of-way containing 11-foot wide sidewalks and a 28-foot wide roadway with parking on both sides. Also, SE 65th Avenue ends one block to the north of the site at SE Holgate, where traffic must turn either to the right or left. Because views of the sign from the roadway may

be blocked or partially blocked by parked vehicles and because traffic may be limited in speed and quantity due to street width and termination, no traffic or safety hazard should be created and this criterion can be met.

c. The adjustment will allow a unique sign of exceptional design or style which will enhance the area or which will be a visible landmark: or

Findings: The trio of signs will be complimentary in size and will enhance the building wall on which they will be painted. This is because they will fit within existing, equal-sized, recessed panels that are currently featureless elements that appear as an after-thought or as previous storefront windows that were filled in. The signs will enhance the building wall and the area. This criterion is met.

d. The adjustment will allow a sign that is more consistent with the architecture and development of the site.

Findings: The applicant has chosen to address subsection **C.1.c.** above. Thus, this criterion is not applicable.

2. Site Difficulties: Not applicable for this proposal as the applicants have chosen to address the Area Enhancement criteria above.

Development Standards:
The applicant has requested an adjustment to the development standards for signs in order to paint signs on the

east side of an existing commercial building. This request is discussed above. This section discusses compliance with the other development standards for this proposal. Any plans submitted for a building or zoning permit must demonstrate that all development standards of Title 33 can be met, or have received an Adjustment or Modification via a land use review prior to the approval of a building or zoning permit.

In addition to any necessary building or zoning permit, this decision must be recorded and a sign permit must be approved and issued before the new signs may be painted. This review and any permit issued will supersede the application for sign permit in 2001.

III. ADJUSTMENT COMMITTEE CONCLUSIONS

The proposal is for three signs painted directly on the east wall of a building located at the intersection of SE Foster and 65th Avenue. One, 129 square foot sign has already been pained on the wall. The two new signs will be located on either side of the existed sign. These types of signs, although they do not contain words or logos, are defined as signs by Title 32, the Portland Sign Code. Title 32 contains standards for many different types of signs located throughout Portland in many different different zones. Sign standards applicable to this location (CS zone) and type of sign limit the area per sign to 100 square feet and for this particular building, limit the amount of signs to 143.25 square feet.This adjustment review was necessary because the applicant's proposal exceeds these standards. Although the appellant challenged the constitutionality of the City's adjustment process and its applicability to what he describes as murals or public art, the Committee acknowledged that their review was limited to determining whether the Administrative Decision correctly

applied the approval criteria for the requested adjustment based on the facts.

With that, the Committee finds the adjustments to individual sign size and overall sign area can be approved for the following reasons: 1) the signs are located on a Local Service Street, oriented to a commercial district, rather than facing SE Foster, 2) the signs are on the ground level which will limit the scope of impact., 3) the signs are adjacent to a one-way, 28-foot wide roadway with parking on both sides. This street ends one block to the north, thereby limiting traffic quantity and speeds, 4) the signs will be located within the existing recessed panels which are currently featureless elements which detract from the the overall quality of the building and the area, and 5) the trio of signs will be complimentary in size and will enhance the building wall and area.

Approval is based on the proposal for three signs (10' 1" x 11', 11' 9" x 11' and 11' 8" x 11') that are attached to the building by paint, located totally within existing recessed panels on the east building wall. The existing two-bulb spotlight over the existing sign may remain, but no additional lighting of the existing or new signs will be allowed.

IV. ADJUSTMENT COMMITTEE DECISION

Deny the appeal and uphold the Administrative Decision of of approval with condition, as follows:

Approval of an adjustment to the sign standards to allow three signs (10' 1" x 11', 11' 9" x 11' and 11' 8" x 11', for a total of 367 square feet) that are attached to the building by paint only. These signs must be located totally within the existing recessed panels on the east building wall, and be in

substantial conformance with Exhibit C1 and C2, signed and dated December 30, 2002. Approval includes the existing 140 square feet of signs on the SE Foster Road building facade, for a total sign area on both faces of 507 square feet. Approval is based on the following condition:

No additional lighting beyond what currently exists (the two-bulb spotlight above the existing painted sign in the existing recessed panel) or that which would have the effect of further lighting the signs is allowed on the east wall. Lights that do not illuminate the signs are allowed.

The applicant/appellant did not prevail. Thus, no refund will be issued.

Staff Planner: Susanne Searle

Date Decision Rendered: March 18, 2003

These findings and conclusions were adopted by the Portland Adjustment Committee on April 1, 2003.

By: "s/ Richard Jensen **by: s/** N Quan

Kelsey Beardsley, Alternative Chair

Date Final Decision Rendered/Mailed: April 4, 2003

Appeal of this decision. This decision is final and becomes effective the day of the notice of decision is mailed (noted above). This decision may not be appealed to City Council; however, it may be challenged by filing a "Notice of Intent to Appeal" with the State Land Use Board of Appeals (LUBA) within 21 days of the date the decision is mailed, pursuant to

ORS 197.620 and 197.830. A fee is required, and the issue being appealed must have been raised by the close of the record and with sufficient specificity to afford the review body an opportunity to respond to the issue. For further information, contact LUBA at the Public Utility Commission Building, 550 Capitol Street NE, Salem, OR 97310 [Telephone: (503) 373-1265].

Recording the final decision. This is the final local decision on this application. You may record this decision the day following the mailed/filed date shown above.

The applicant, builder, or representative may record the final decision as follows:

- By Mail: Send the two recording sheets (sent in separate mailing) and the final Land Use Review Decision with a check made payable to the Multnomah Recorder to: Multnomah County Recorder, P.O. Box 5007, Portland OR 97208, The recording fee is identified on the recording sheet. Please include a self addressed, stamped envelope.

- In Person: Bring the two recording sheets (sent in separate mailing) and the final Land Use Review Decision with a check made payable to the Multnomah Recorder to the Multnomah County Recorder to the County Recorder's office located at 501 SE Hawthorne Boulevard, #158, Portland OR 97214. The recording fee is identified on the recording sheet.

For further information on recording, please call the County Recorder at (503) 988-3034.

Expiration of this approval. This decision expires 3 years

from the date it is recorded unless:

- A building permit has been issued, or
- The approved activity has begun, or
- In situations involving only the creation of lots, the land division has been recorded.

Applying for your permits. A building permit, occupancy, or development permit must be obtained before carrying out this project. At the time they apply for a permit, permittees must demonstrate compliance with:

- All conditions imposed here.
- All applicable development standards, unless specifically exempted as part of this land use review.
- All requirements of the building code.
- All provisions of the Municipal Code of the City of Portland, and all other applicable ordinances, provisions and regulations of the city.

EXHIBITS-NOT ATTACHED UNLESS INDICATED

A. Applicant's Statement
B. Zoning Map (attached)
C. Plans/Drawings
   1. Site plan (attached)
   2. East elevation (attached)
   3. Sketch of second panel.
   4. Topographical map of area with building footprints, 3/92
D. Notification Information:
   1. Mailing list
   2. Mailed Notice
   3. Criteria, Findings, Conclusions and Decision (attached)

E. Agency Response
   1. Bureau of Environmental Services
   2. Bureau of Transportation Engineering and Development Review
   3. Fire Bureau

F. Correspondence
   1. Foster-Powell Neighborhood Association, supports proposal

G. Other:
   1. Original LU Application
   2. Site History Research
   3. Two photographs of site, submitted with application
   4. Party of interest statement

H. Appeal
   1. Statement (attached)
   2. Notice of Appeal Hearing for March 4, 2003
   3. Appeal Mailing List
   4. Notice for Appeal Continuation of Hearing on March 18, 2003

I. Received Before Hearing
   1. Memo from Office of City Attorney, February 26, 2003
   2. Analysis of case from Joseph Cotter, February 28, 2003
   3. Intra-bureau memo and copy of original sign application, March 3, 2003
   4. Slide presentation to Committee by staff.
   5. Letter from Joseph Cotter to Committee
   6. Letters and comments received
   7. Letter to extend the 120 day limit from Joseph Cotter
   8. Letter from Joseph Cotter to Committee
   9. Copy of another neighborhood mural not painted

because of regulations

10. Letter from Maureen Newby, received March 24, 2003

Copies

1. Joseph Cotter, applicant/appellant
2. All Parties who Wrote or Submitted Testimony at the Public Hearing
3. Neighborhood and/or Business Association(s)

SS/April 1, 2003

CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

The Fifth Amendment of the United States Constitution:

No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or navel forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CITY OF PORTLAND SIGN CODE, TITLE 32

32.22.020 YY. Sign. Materials placed or constructed, or light projected, that (1) conveys a message or image and (2) is used to inform or attract the attention of the public. Some examples of 'signs' are materials or lights meeting the definition of the proceeding sentence which are commonly referred to as signs, placards, A-boards, posters, billboards, murals, diagrams, banners, flags or projected slides, images or holograms. The scope of the word 'sign' does not depend on the content of the message or the image conveyed."

32-38-030C. Approval Criteria. Sign adjustments will be approved if the review body finds that the applicant has shown that the criteria of Paragraph C.1 or C. 2, below are met. The applicants have chosen to address paragraph C.1.

1. Area Enhancement: The applicant must meet crit ia ***a*** and ***b*** and either ***c*** or ***d***.

a. The adjustment for the proposed sign will not significantly increase or lead to street level sign clutter to signs adversely dominating the visual image of the area, or to a sign which will be inconsistent with the objectives of a specific plan district or design district; and

b. The sign will not create a safety hazard; and

c. The adjustment will allow a unique sign of exceptional design or style which will enhance the area or which will be a visible landmark: or

d. The adjustment will allow a sign that is more consistent with the architecture and development of the site.

32.38.010 General

C. Content Neutral Administration of Land Reviews

Notwithstanding any other provision of this Title or of related standards referenced in this Title, applications for adjustments, design review, and historic design review for signs will be reviewed only with respect to sign structure or placement, or with reference to copy only to the extent of color or typeface and excluding any reference to message, category, subject, topic, or viewpoint.

Article I, Section 8, Oregon Constitution

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

PORTLAND COMPREHENSIVE PLAN

Goal 12 URBAN DESIGN

12.5 Promote the Arts

Humanize the City through promotion of the arts and excellence in design. Encourage the placement of art at locations that are visible to the public. Expand Portland's collection of public art. Punctuate the community with works of art used to emphasize focal points, mark transitional locations, celebrate public buildings and to enhance the City's sidewalks, open spaces, plazas and parks.

Objectives

A. Provide a part of the construction costs of public projects for the purchase and installation of art.

B. Create incentives for the provision of public art as part of private development projects.

C. Emphasize important places, transitions and gateways within Portland by celebrating them with works of art. Use art to add interest to the experience of the City's citizens and to accent locations such as transit stations, sidewalks, streets, parks and building lobbies that are visited by many people.

D. Foster the growth of the public art collection within Portland that is part of our legacy to the City's future.

IN THE CIRCUIT COURT FOR THE STATE OF OREGON
IN AND FOR THE COUNTY OF MULTNOMAH

AK MEDIA v. CITY OF PORTLAND
Case No. 9801-00125
Michael H. Marcus, Judge
June 3, 1999

Conclusion

I have concluded that the sign code violated the First Amendment because the distinction based on text, numbers, registered trademarks and registered logos intentionally favored murals as one category of protected expression over other categories of noncommercial speech without adequate governmental justification, and because the sign code was unjustifiably "content-based" within the meaning of federal constitutional law. I have concluded that the plaintiff is not entitled to an injunction forcing the City to issue the permits in question because the new sign code (in common with the wall sign moratoria) is 'content neutral, 'because the plaintiff has failed to demonstrate on this record that there are not adequate alternative channels of expression in light of the 566 billboards it still maintains in Portland, because neither the sign adjustment criteria nor the design review guidelines have been applied to the plaintiff in other than a 'content neutral' manner and because both are now construed as requiring a content neutral application, and because the essence of the First Amendment violation that plaintiff suffered is not denial of the permits *per se* (because the City could constitutionally choose and has now chosen to subject murals and billboards to the same regulation) but of a sign code that was impermissibly *underinclusive* until the City

made the required choice either to regulate murals and billboards alike or to spare regulation (or to take any other constitutional action).

Further I have concluded that the plaintiff is entitled to damages measured by the loss of income and the expense of land use and appeal permits during and on the authority of the now repealed unconstitutional sign code. Accordingly

Order

IT IS HEREBY ORDERED AND ADJUDGED

Pet. App. 45

OFFICE OF PLANNING
and
DEVELOPMENTREVIEW

1900 SW Fourth Ave., Suite 5000
Portland, Oregon 97201
Telephone: (503) 823-7300
TDD: (503) 823-6868
FAX: (503) 823-5630
Land Use Review Division
www.opdr.ci.portland.or.us

October 22, 2001

RECEIVED
OCT. 24 2001

Southeast Uplift Neighborhood Program
3534 SE Main St.
Portland, OR 97214

Dear Ms. Laura Feldman,

This letter is in response to the Southeast Uplift Neighborhood request for a waiver of the land use review fee.

Due to budget reductions, the Office of Planning and Development Review no longer grants fee waivers to nonprofit agencies, community development corporations or other nonprofit groups. The Office of Planning and Development Review is supportive of such efforts such as those put forth by the Southeast Uplift Neighborhood Program and recognizes the valuable service and enhancement to our community provided by your organization; however, we are unable to favorably grant all fee waiver requests.

As Susan Feldman, manager of our Land Use Review

Division, indicated to you over the phone, I am concerned that your proposal would not meet the approval criteria for a sign adjustment and gain a favorable staff recommendation. Our administrative decision can be appealed to the Adjustment Committee. While a community sponsored and painted mural is supportive of the City's Neighborhood enhancement goals, our Code recognizes murals as signs once they contain images. As such, murals must meet all sign regulations and the City cannot control the content of the sign in the future or ask that it be removed or reduced in size.

If your organization chooses to pursue an Adjustment through the land use review process, you will be assessed a fee as listed on the Land Use Review Fee Schedule. If the final decision from the city is that of approval or denial, the fee is not refundable.

Very truly yours,

"s/ Margaret Mahoney"

Margaret M. Mahoney
Director

Cc. Susan H. Feldman, Land Use Review Principal Planner

The Office of Vera Katz
Mayor Portland Oregon
The City that Works

March 4, 2002

Joseph Cotter
31810 SE Wildcat Mtn. Dr.
Eagle Creek, OR 97022

Dear Mr. Cotter.

Thank you for writing to share your concerns regarding the Portland Sign Code.

In a recent letter on this issue, Margaret M. Mahoney, the Director of the Office of Planning and Development Review (OPDR), pointed out that, "The position of the City to regulate murals as signs grows out of protective free speech provisions of the State of Oregon Constitution. Our state constitution has been found to be even more protective of speech than that of the United States, and Oregon Courts have held that regulation cannot discriminate on the content of the visual display."

As you pointed out, the court found the City's previous code, which regulated signs but exempted murals, was discriminatory and therefore unconstitutional. Because of this, the City Council had to make a choice. The City could regulate all images on the walls or they could regulate none of them. The council determined that it would be in the best interests of the City to regulate all images on the walls.

The Mayor and the City Council are aware of the concerns of

muralists. Even though they chose to regulate murals, the decision was made reluctantly and each of them stated during the process that they would like to see a different solution.

The City Council has directed OPDR to continue looking for a solution to this problem. At this time OPDR is studying court cases that might suggest ways to regulate with more flexibility. Until more favorable direction is received from the courts, the City must continue to include murals in the enforcement of the Sign Code.

Thank you again for taking the time to write about the inclusion of murals in the City's Sign Code. I am forwarding a copy of your letter to Margaret Mahoney and encourage your continued interest in seeking a resolution to this issue.

Sincerely,

s/"Sam Adams"

Sam Adams
Chief of Staff

SEAL
The City
of Roses

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VK:df